SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. [redacted]

THE TEE-HIT-TON INDIANS, AN IDENTIFIABLE GROUP OF ALASKA INDIANS,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

JAMES CRAIG PEACOCK,
Counsel for Petitioner.

MARTIN W. MEYER,
WILLIAM L. PAUL, JR.,
FREDERICK PAUL,
JOHN E. SKILLING,
JOHN H. MYERS,
Of Counsel.

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No. 696

THE TEE-HIT-TON INDIANS, AN IDENTIFIABLE GROUP OF ALASKA INDIANS,

Petitioner,

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THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The above-named petitioner, by its counsel of record, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims in this cause.

Opinion Below

The opinion below entered on April 6, 1954 (R. 16), is not yet officially reported.

Jurisdiction

The judgment below was entered on April 13, 1954 (R. 33). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1255(1).

Statement of the Case

This is a suit by the Tee-hit-ton Indians, a "clan" of American Indians in Alaska. Its members are descendants of the earliest known native inhabitants of an area of land within the exterior boundaries of the Tongass National Forest in southeastern Alaska. It claims that a compensable interest in land belonging to it was taken when the United States, on August 20, 1951, agreed to sell to the Ketchikan Pulp & Paper Company all merchantable timber on a specified portion of the land. The Government's agreement was executed in accordance with the terms of two statutes, the most directly pertinent of which is the Act of August 8, 1947, 61 Stat. 920, the full text of which is set out in the opinion below at R. 23.

The judgment below (R. 16) arose out of the separate trial of a limited number of issues. In pursuance of its Rule 38 (b) the United States Court of Claims had ordered such a trial of six issues of law (and related issues of fact) the decision of which might make unnecessary the taking of voluminous evidence as to use, occupation, and value of large and remote areas in Alaska (R. 6-8). Following an argument in regular course on December 1, 1953, the case was reargued on March 3, 1954, "at the request of the court" (R. 16).

The first issue was occasioned by the Government's challenge to the petitioner's capacity to sue. Petitioners' right to maintain this suit was sustained, and that issue is not involved in this petition. The remaining issues had to do with the merits, and the judgment dismissing the petition follows the court's opinion on those issues as summarized at R. 32 in its "Conclusion of Law"—

> "Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is an identifiable group

> of American Indians residing within the territorial limits of Alaska within the meaning of 28 U. S. C. § 1505 [issue 1]; that, the court being of the opinion that the plaintiff's interest in the lands prior to the treaty of 1867 was original Indian title, which, if it survived the cession of 1867, would not be a right on which a suit against the United States could be based, does not answer the question posed in issue 2; that no property rights in the land in question enforceable by suit against the United States inured to the plaintiff by reason of the statutes cited in issues 3 and 4; that issues 5 and 6, as stated, do not call for answers, in view of the court's answers to the other questions."

There has never been any final decision of this Court as to the nature and extent of Indian land titles in Alaska. The gist of petitioner's case is that there are two major considerations which necessarily lead to an end result very different from the familiar stateside concept of "original Indian title". One is the fundamentally different historical, political, and legal background of Russian America. The other is the provisions of several Acts of Congress which apply only to Alaska and have never had any stateside counterparts.

The Statutes

The relevant parts of all of the statutes involved already appear in full in the opinion of the court below.

The text and citation of the Acts of May 17, 1884, March 3, 1891, and June 6, 1900, dealing with the Indians' rights, are printed at R. 15 and 23.

The complete text and citation of the Joint Resolution of August 8, 1947, purporting to authorize the timber sales contract and often referred to as "the Act" of that date are printed on the following page at R. 23-24.

The Questions Presented

In broad outline this case presents two principal questions. One is as to the present nature and extent of Indian land titles in Alaska. The other is the effect of timber sales agreements executed pursuant to the Joint Resolution of August 8, 1947.

More specifically, this petition seeks review of the action or inaction below on the last five of the six legal issues the formal terms of which are already set forth once in the court's order at R. 7-8, and a second time in its opinion at R. 18, 22, and 25. For the present purpose, however, the full scope and implications of those specific issues can be better indicated by a summary of the correspondingly numbered points as argued below—

2. Aboriginal Indian title was equivalent to full proprietary ownership, and in Alaska continues to this day unimpaired by any of the limitations implicit in the familiar stateside concept of "original Indian title.

3 and 4. Possessory rights, also equivalent to full proprietary ownership, and also peculiar to Alaska, would have incured to petitioner under the Acts of May 17, 1884, and June 6, 1900. (Issues 3 and 4 are wholly independent of Issue 2).

5. The evidence of recent less intensive use by petitioner of its ancestral Tee-hit-ton area (as summarized in paragraph 17 of the findings of fact at R. 30) does not constitute a prima facie case of termination or extinguishment of any title or possessory rights which it may establish under Issues 2, 3, or 4.

6. The appropriation of timber rights implicit in the execution of the timber sale agreement by respondent's agents on August 20, 1951, constituted as of that date a partial and compensable taking of any title or possessory rights that petitioner may establish under the principles declared in the preceding points.

An entirely new issue has also been injected into the case by the court itself as a result of the way in which it sought to dispose of Issue 2. On the basis of its conclusion of law (R. 32) that petitioner's interest prior to the treaty of 1867 was original Indian title, it avoided deciding whether that interest survived the cession of 1867 by ruling that even if it did, such original Indian title would not be a right on which a suit against the United States could be based. That ruling, unsupported as it is by either explanation or citations, constitutes a new and additional issue.

Reasons Relied upon for Allowance of the Writ

The outstanding reason why this petition should be granted is the seriousness of the present lack of an authoritative decision on any phase of the nature or extent of Indian land titles in Alaska, and the crying need for a final decision of this Court which alone can resolve the irreconcilable three-way conflict between the two courts and the one executive department which in regular course have had occasion and jurisdiction to rule upon the subject.

In order of time Solicitor's Opinion M. 31634, 47 I. D. 461, approved by the Secretary of the Interior, February 13, 1942, and reaffirmed by the Secretary three years later on July 27, 1945, and again on January 11, 1946, came first. It held that

> "aboriginal occupancy establishes possessory rights in Alaskan waters and submerged lands, and that such rights have not been extinguished by any treaty, statute, or administrative action."

Next came *Miller* v. *United States*, 159 F. 2d, 997, decided March 18, 1947, by the Circuit Court of Appeals for the Ninth Circuit which includes Alaska. It too dealt with Alaska tidelands as to which it held that on the contrary all aboriginal rights or original Indian title stemming there-

from had been extinguished by the Treaty of 1867. It further held, however, that under the Acts of 1884, 1891, and 1900, Indian occupancy gave rise to a compensable interest, enforceable indirectly by Indian defendants in a condemnation case even in the absence of any express jurisdictional statute.

Third in the series is the decision below in the instant case, which does not accord with either of the others on any material point.

Indeed, the conflict is more nearly six-way than three-way if consideration is not confined to formal decisions made in regular course and presumably after full consideration. To cite a few factors which have contributed further to aggravate an already confused picture—

> In a footnote dictum at 337 U. S. 106 (*Hynes* v. *Grimes Packing Co.* 337 U. S. 86, 1949) this Court suggested an inability to agree with the conclusion in the *Miller* case, although the last two sentences of the footnote indicate that the comment may have been occasioned more by criticism of the reasoning of the opinion rather than necessarily by the final conclusion itself. (The point had not been argued by either party, and it is not clear whether it was even raised by the record).
>
> The Government's recent prosecution of *United States* v. *Libby, McNeil, & Libby*, 107 F. Supp. 697, (1952) reveals unusually confused and conflicting action at an intra-departmental level in still another executive department which is most illuminating in the present connection. In an effort to enjoin the operation of a commercial fish trap within the boundaries of an Alaskan Indian reservation the United States filed a brief bitterly attacking the holding in the *Miller* case that aboriginal rights had been extinguished by the Treaty. When copies of that brief reached Washington, however, the Department of Justice on August 21, 1952, wrote a letter criticising and repudiating the position taken by the United States Attorney because

(and here appears a new point to add to the confusion)—

"We believe that decision is correct in holding that there are only individual rights of occupancy in Alaska protected by the early Acts of Congress and we are relying on the *Miller* case in several actions pending in the Court of Claims and the Indian Claims Commission."

In connection with the last clause of the quotation it will be noted that this was three years after this Court's criticism of *Miller* in the *Grimes* case, supra.

Enough has been said to illustrate the extent of the conflict and confusion and uncertainty which prevails all along the line. Let us turn to the unanimous representations of the highest officials from the President down which confirm the seriousness of it all and establish how important it is that the present opportunity to go a long way toward resolving this problem should be availed of to the fullest possible extent.

On May 21, 1948, the President of the United States, in a special message to Congress, warned that—

"A special legal problem is at present hampering the development of Alaka. This is the question of whether or not Alaska natives have claims to the ownership of certain land. * * *"

Only a few months earlier on September 18, 1947, the Governor of Alaska (an appointee of respondent and not an elected officer) reported to the Secretary of the Interior that—

"The issue of aboriginal rights will, I think all concerned agree, have to be settled at the earliest possible moment. * * * Until it is, a doubt will cloud every potential investment and every venture in development in southeastern Alaska. * * *"

But even more informative are the official representations of the Interior Department with respect to the then pending bill which eventually became the Act of August 8, 1947, as printed at R. 23. On May 16, 1947, the Secretary of the Interior wrote the Speaker of the House of Representatives as follows—

> "The question of native land titles in the Territory of Alaska has remained, in the large, unresolved throughout the history of that Territory. It is not yet authoritatively settled whether the Alaskan Cession Treaty of 1867 (15 Stat. 539) preserved or extinguished, the native or aboriginal title to lands. If not extinguished, and if not subsequently abandoned, these rights exist in some form as a valid type of land ownership (*United States v. Sante Fe Pacific R. R. Co.* (314 U. S. 339), *Alcea Band of Tillamooks v. United States*, No. 26, October Term 1946, Supreme Court). Even if aboriginal title were extinguished by the 1867 treaty, native possessory rights may well remain, in one form or another by virtue of legislative recognition. Thus, Section 8 of the Act of May 17, 1884 (23 Stat. 24), declared that 'the Indians or others persons in said district shall not be disturbed in the possession of any lands actually in their use and occupation or now claimed by them.' See, also Section 14 of the Act of March 3, 1891 (26 Stat. 1095), and Section 27 of the Organic Act of June 6, 1900 (31 Stat. 321).
>
> "The actual extent of native possessory rights has not yet been determined by the courts, nor has the Congress enacted any very clear definition of these rights. There has resulted a cloud upon land titles in Alaska, a tremendous uncertainty as to the amount and the boundaries of the public domain in that Territory, and a thorough-going confusion, on the part of the natives and whites alike, as to the lands which are or may be held under native title. The problem has been a troublesome one for many decades, and has become especially acute in recent years in southeastern Alaska.
>
> "In the present state of uncertainty as to the law

> and facts relating to native possessory rights in southeastern Alaska, no attorney would be willing, in a transaction of this magnitude, to assure the contractor or his underwriters that the Forest Service had a certainly good title to the timber within the boundaries of the Tongass National Forest. For, if the native title to a particular tract were a 'valid, existing right' on September 10, 1907, when the Tongass National Forest was established, that tract is not included within the National Forest. In such cases, one relies upon the Government grant or contract at his peril (*United States v. Santa Fe Pacific R. R. Co., supra; Cramer v. United States*, 261 U. S. 219; *Jones v. Meehan*, 175 U. S. 1."

And on May 26, 1947, the Assistant Secretary of the Interior in the same connection testified before a House Committee as follows—

> "There is at this point only one major obstacle to that development, which is the aboriginal claims, or the native possessory claims under subsequent statutes of Congress, as to land and therefore as to timber within the Tongass National Forest. That is an exceedingly complex legal problem, the answer to which is clear to no person. * * *
>
> "In 1867 we acquired Alaska from Russia. The treaty may or may not have served to extinguish what we call the aboriginal, native title to the land. That has been in dispute a number of years and is still unsettled. Whether or not the treaty served to extinguish those rights the native land rights continued in some form not clearly stated, and by no means unanimously agreed upon by the interested persons, by virtue of three Acts of Congress: One in 1884, one in 1891, and one in 1900. Each served to preserve the native rights to lands occupied by the natives. * * *
>
> "Returning to this thumbnail sketch of the troubled waters of the law, if these decisions of the Supreme Court which are applicable to the continental United States apply to Alaska, then the natives have substan-

tial and probably rather extensive claims to the land embraced within the Tongass National Forest."

The dates of all of the above representations are especially significant. Each is subsequent to that of the *Miller* case, *supra*.

The instant case has been shaped from the very outset to serve as a test case and it thus affords a medium especially well adapted for the presentation to this Court of the questions involved. It has been recognized as such a case by all interested parties. For example, in another pending case in the United States Court of Claims the Government has sought and been granted an extension of time for filing its answer until thirty days after the opinion is rendered in the case at bar. And in still another case in the Indian Claims Commission the Government has repeatedly sought and been granted similar extensions for nearly three years. Several other Alaska cases which are now pending in both of those tribunals will be affected by the final decision in this case, and current timber and oil developments will eventually make it of direct concern both to a constantly increasing number of Alaska clans and to the timber and oil interests on whose promotional efforts will depend much of the future development of that great Territory. Two recent concrete illustrations can be cited.

The Alaska press has just reported that the clans of the Yakutat community have the distinction of being the first Indians to achieve any financial gain out of oil in Alaska and in particular that they have received commitments of $30,000 from two oil developments companies for covenants not to sue those companies for operating under leases granted by the United States. The undersigned counsel can confirm the substantial accuracy of these reports, for not only are those clans numbered among his own clients, but their concern in the present case is so great that they have

placed at his disposal a substantial contribution toward the expenses of carrying it forward.

The other illustration takes us right into the halls of the Congress itself where the House Committee on Interior and Insular Affairs has currently under consideration a Bill, H. R. 1921, the general purpose of which is to establish a sort of declaratory judgment procedure for the settlement of possessory land claims in Alaska. The importance which that Committee attaches to this subject is evidenced by the number of hearings on that subject which it has held both here and in Alaska, and by the number of prints of bills and reports which it has released from time to time. And the continuing concern of the timber interests is confirmed by the following, which appears on page 7 of recent Committee Print No. 12 of January 11, 1954:

> "Legal counsel for the Ketchikan Pulp Co., by letter of November 30, 1953, has advised the Chief of the Forest Service that—
>
> 'The officers of the company are greatly disturbed by the bill insofar as it would affect lands within the Tongass National Forest, Alaska, since the company's contract of July 26, 1951, for the right to purchase timber would, as we see it, be directly affected by the bill as it is now written * * * should aboriginal rights to the lands and the timber allotted to the company be established it would be possible for the courts to award to aboriginal claimants title to the lands subject to the contract of purchase. In other words, under this bill as now drawn, claimants could succeed to the rights of the Government and the company would have to deal with them instead of the Forest Service in connection with the administration of the contract. This would create an intolerable situation * * *. We feel that if aboriginal claims are established to the lands of the Tongass Forest covered by the contract of July 26, 1951, with the company, the relief of such claimants should be limited to a money judgment against the United

> States for the value of said lands. It would, in our opinion, amount to a breach of good faith on the part of the United States if the title to the lands covered by the company's contract would in the course of time vest in third parties as this bill contemplates. * * *'' '[1]

To digress for a moment from Alaska, it is common knowledge that there is a large number of pending or potential stateside cases which would also appear to be affected by the present ruling that "original Indian title * * * would not be a right on which a suit against the United States could be based." If so, the importance of the review here sought is correspondingly enhanced. For even though some or all of such cases may be distinguishable on other grounds, such for example as differences in the jurisdictional acts, etc., the very existence of such a broad and unexplained and unreviewed ruling would inevitably occasion much otherwise unnecessary litigation and additional demand on the time and effort of the courts.

Whether the decision of the court below is right or wrong is of course not the immediate question. But the fact that its opinion studiously avoids any attempt to reconcile its conclusion with at least one controlling decision of this Court which was briefed and argued at length is definitely of significance at the present stage. For although it pioneers on its own initiative a new rule that "original Indian title" obtained in Alaska, it does not even mention *Johnson* v. *McIntosh*, 8 Wheat 543, the fountain head of all law on that subject. (Petitioner's position has always been that

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[1] The concern of the Company and its counsel was further evidenced by their appearance before the Committee at a hearing on January 13, 1954. The contract referred to is the same identical contract which gave rise to the case at bar. A lapse of several weeks between execution by company officers and approval by the Chief of the Forest Service accounts for the slight discrepancy in dates. See paragraph 21 of the findings of fact at R. 31. This company did not exercise the same foresight as did the oil companies at Yakutat.

the principles and reasoning of that case are more important here than the end result that happened to have been reached in that particular instance.)

WHEREFORE, petitioner prays that a writ of certiorari issue to review the decision below.

Respectfully submitted,

JAMES CRAIG PEACOCK,
Counsel for Petitioner.

MARTIN W. MEYER,
WILLIAM L. PAUL, JR.,
FREDERICK PAUL,
JOHN E. SKILLING,
JOHN H. MYERS,
Of Counsel.